

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE v. ROBERT LEONARD MOSLEY

**Direct Appeal from the Circuit Court for Henry County
No. 13474 C. Creed McGinley, Judge**

No. W2004-00228-CCA-R3-CD - Filed April 19, 2005

DAVID G. HAYES, Judge, dissenting, with regard to sentencing modification.

The majority concludes that modification of the defendant's sentence is required in light of *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004). I must respectfully dissent.

Any sentencing challenge available to the defendant under *Blakely* is now waived because the defendant did not object at trial to what he now contends is a constitutionally invalid sentencing scheme. *See* Tenn. R. App. P. 36(a). Our rules of appellate procedure provide that an issue may not be raised for the first time on appeal. Tenn. R. App. P. 36(a). I see no valid reason to carve out an *Apprendi/Blakely* exception to this established rule. In *United States v. Cotton*, 535 U.S. 625, 631-34, 122 S. Ct. 1781, 1785-87 (2002), the Supreme Court held, after its decision in *Apprendi*, that the defendant's claim of right to a trial and finding by a jury on a fact used to enhance the defendant's sentence was forfeited because it was not raised at trial. Similarly, I find the Supreme Court's ruling in *Cotton* applicable to the review of *Blakely* claims raised on appeal in this State.

Review and modification of the defendant's sentence for the first time on appeal not only has the effect of removing the trial court as the primary sentencing court, it also denies the State the opportunity to be heard in the sentencing decision. Because the issue is waived, it is reviewable on appeal only under the discretionary authority of plain error. *See* Tenn. R. Crim. P. 52(b).

An appellate court is permitted to correct plain error, or in this case *Blakely* error, only when the error is "of such a great magnitude that it probably changed the outcome of the trial." *State v. Adkisson*, 899 S.W.2d 626, 642 (Tenn. Crim. App. 1994). Clearly, this was the import of the Supreme Court's recent holding in *U. S. v. Booker*, 543 U. S. ____, 125 S. Ct. 738, 769 (2005), wherein it opined that not "every [*Blakely/Booker*] appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test."

The record overwhelmingly supports application of enhancing factor (10), use of a firearm during the commission of the offense. Indeed, on appeal, the defendant does not contest the fact that he used a firearm during the attempted second degree murder of the victim. I find that under plain-error review had a jury heard the proof with regard to factor (10), its verdict would clearly have been the same. Moreover, I conclude that the defendant's use of the weapon, coupled with his drug and alcohol induced state at the time of its use and the manner in which the weapon was used, permits enhancement of his sentence for attempted second degree murder by two years and enhancement of his aggravated assault sentence by one year.

The majority rejects enhancement factor (10), not because it does not exist, but because it violates *Blakely*. As noted above, the *Booker* Court observed that this should not end the inquiry, however, as the reviewing court is expected to determine whether the sentence fails the "plain-error" test. The record demonstrates that the defendant has failed to establish prejudice in order to satisfy the "affecting substantial rights" requirement of the "plain-error" test, Rule 52(b). *See Cotton*, 535 U.S. at 1786, 122 S. Ct. at 633 (affirming enhancement of the defendant's sentence following plain error analysis notwithstanding presence of *Apprendi* error). For these reasons, I would affirm the sentences as imposed by the trial court.

David G. Hayes, Judge